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771-470—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 924

JAMES ALLEGRETTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 925

LOUIS DARLAK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 926

DAVID FALZONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The April 22, 1964, opinion of the court of appeals (No. 924, App. 1a–20a) is reported at 340 F. 2d 243.

The December 22, 1964 opinion of the court of appeals sitting *en banc* (No. 924, App. 22a–30a) is reported at 340 F. 2d 254.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1964 (No. 924, App. 31a). A petition for rehearing was denied on January 21, 1965 (No. 924, App. 32a), and the petitions for writs of certiorari were filed on February 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court properly ruled in the presence of the jury at the close of the government's case that all the evidence on which ruling had been reserved was admissible against all the defendants whether or not present, on the ground that the court was satisfied that a sufficient connection had been shown.

2. Whether the government's cross-examination of an impeaching defense witness was proper.

3. Whether certain statements made after discovery of some of the stolen whiskey were admissible as in furtherance of the conspiracy.

4. Whether post-conspiracy statements were properly admitted solely against the one petitioner who participated in the conversation.

STATEMENT

Petitioners[1] were convicted by a jury in the United States District Court for the Southern District of

[1] Co-conspirator Covelli pleaded guilty (A. 13, 162) and testified for the government at the trial (A. 137–246). Co-defendant Joseph (Ruffy) Lisciandrello was severed during

Illinois, on an indictment[2] charging conspiracy to possess whiskey stolen from an interstate shipment and the substantive offense of possessing (on March 17, 1958) whiskey stolen from an interstate shipment, in violation of 18 U.S.C. 659 (A. 29–32).[3] Each was sentenced to imprisonment for five years and fined $3,000 on the conspiracy count, and sentenced to a concurrent term of seven years on the substantive offense (A. 517–519). On appeal, a panel of the Seventh Circuit reversed the convictions on the ground that when the trial court, at the close of the government's case, announced that the evidence of acts and statements upon which ruling had been reserved were admissible against all defendants, it erred in stating to the jury that the court was satisfied that a connection existed between such acts and the defendants. However, on rehearing en banc, the court reversed its position and affirmed the convictions with one dissent.

The evidence[4] showed that on December 27, 1957, a truckload of "Old Sunnybrook" whiskey was sealed and driven from Louisville, Kentucky, to the dock of the Indianapolis Forwarding Company in Chicago, Illinois, where it was parked to await delivery to the

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trial because of illness (A. 19, 110). Co-conspirator Frank (Hot Dog) Lisciandrello has not petitioned for a writ of certiorari.

[2] The indictment was returned in the Northern District of Illinois. The case was transferred for trial to the Southern District of Illinois on petitioner's motion for change of venue on the ground of adverse publicity (A. 15, see also A. 52–58).

[3] The narrative appendix prepared by petitioners for the court below will be referred to with the prefix "A."

[4] The court of appeals held unanimously that there was sufficient evidence to support the verdict as to each petitioner.

consignee; that the truck was subsequently stolen; and that on January 2, 1958, it was found empty in a vacant lot in Chicago (A. 491–494).

In January, petitioner Darlak told co-conspirator Covelli about the stolen whiskey and inquired whether it could be sold. Covelli said he did not think so because it was in half pints (A. 138). In late February or early March, Darlak again mentioned the whiskey and Covelli suggested they talk to co-conspirator Joseph Lisciandrello. At a meeting that afternoon, Lisciandrello said he would let them know after he got in touch with his partner, petitioner Allegretti (A. 139). Lisciandrello, Darlak, Covelli, and Falzone finally agreed that the whiskey would be stored in the Cafe Continental, which was managed by Covelli and Falzone. They were to receive 25% of the whiskey as their share (A. 140). Covelli suggested to Falzone that they should transfer their share into empty gallons and sell it at the cafe (A. 140).

Part of the whiskey was slowly distributed throughout the district (A. 140). Covelli and petitioner Darlak delivered some of it to Ciro's Cocktail Lounge, where petitioner Allegretti directed its stacking. Allegretti told Darlak to send some to the "Front Page" (A. 141). Some was also delivered to the "Flame Lounge," which co-conspirator Joseph Lisciandrello had taken over for a friend (A. 143). Meanwhile, Covelli and petitioner Darlak leased the "Silver Dome" at the suggestion of Joseph Lisciandrello (A. 141–142). Co-conspirator Frank Lisciandrello,

who managed the Silver Dome, used it as a further outlet for the stolen whiskey (A. 142).

On March 17, 1958, government agents raided and seized some of the stolen "Old Sunnybrook" whiskey at the Cafe Continental, Flame Tavern, and the Silver Dome Cafe (A. 143–144, 61–63, 64–66, 496–499). When petitioner Falzone was told that the Cafe Continental was being raided, he told Mr. Max Olshon "Boy we are in trouble. I got a basement full of hot whiskey and the officers are there" (A. 68). Later that evening, when Mr. Olshon talked to Falzone at the F.B.I. headquarters, Falzone gave him the keys to lock up the cafe and told Olshon to get rid of the whiskey from the walk-in box. Later that night Olshon destroyed 24 gallons of whiskey and gave one gallon away (A. 68–69). The following day Falzone told Olshon that the whiskey belonged to Allegretti and co-conspirator Joseph Lisciandrello but that Allegretti would "straighten the whole case out for us" (A. 69).

Covelli left town after the raid and returned two weeks later. The conspirators raised funds which were given to Allegretti to "squash the beef"—*i.e.*, so that there would be no loss of the business or other repercussions (A. 146–147).

ARGUMENT

1. All petitioners complain that the trial court erred in explaining to the jury its ruling that the acts and declarations of the co-defendants could be considered as evidence against all of the defendants, because the government had satisfied the court that a connection

existed between such acts and the several defendants (No. 924, pp. 11–16; No. 925, pp. 8–9; No. 926, pp. 8–9). We submit that in the context of this case no prejudice ensued from the particular choice of words used by the court.

In the course of the trial—as in many conspiracy cases—the court reserved ruling as to whether testimony concerning acts and statements of certain co-conspirators outside the presence of the others was admissible as evidence against the latter (see, *e.g.*, A. 69). At the close of the government's direct case, the trial judge ruled outside the presence of the jury that the government had sustained its burden of proving a *prima facie* conspiracy and therefore the statements made by each defendant in furtherance of the conspiracy were admissible as evidence against all the defendants (A. 294–295). He subsequently explained to the jury that whereas he had previously reserved ruling upon the government's assertion that it would connect up the testimony (A. 296):

> I now rule that the government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.

The trial judge told the jury that such evidence was now admissible against all defendants, whether or not present at the particular time the act was done or the statement was made (A. 296–297). Defense counsel's objection that this ruling invaded the province of the jury was overruled (A. 297–298). Subsequently the defense put on their case (A. 299–397) and the

parties submitted further evidence in rebuttal (A. 397–437).

In its charge to the jury on conspiracy (A. 437–442), the trial court carefully explained that the jury could not consider what other defendants had said in determining whether a particular defendant was a member of the conspiracy; that only after a defendant's membership in the conspiracy had been determined on the basis of other evidence could the statements of his co-conspirators made outside his presence and in furtherance of the conspiracy be considered against him (A. 441). The trial court also admonished the jury that any statement by the judge in ruling upon the admissibility of evidence was not to be considered as an expression by the court upon either the weight or the credibility of the evidence (A. 452).

It is plain that the trial court applied the proper standard in its ruling admitting the evidence (cf. Instruction No. 11 offered by defense (A. 479)). See *United States* v. *Dennis,* 183 F. 2d 201, 230–231 (C.A. 2), affirmed, 341 U.S. 494; *Carbo* v. *United States,* 314 F. 2d 718, 737 (C.A. 9), certiorari denied, 377 U.S. 953. The only question is whether the particular words used by the trial judge conveyed more than a ruling on evidence, and in fact told the jury that a conspiracy had been proved. We do not believe that a statement that a "connection" had been shown between the acts and statements and the defendants would in itself be understood by a jury to mean that a conspiracy had been proved, rather than merely that the evidence was admissible and relevant

on the conspiracy issue. But in any case, any possible misunderstanding on that score was cured by the final instructions, which correctly informed the jury of the manner in which the evidence was to be considered.

Where the existence of a conspiracy must be proved by circumstances, it is manifestly impossible to get all the evidence in at the same time. And when, as here, the circumstances from which a conspiracy may be inferred consist in part of the acts of the various defendants, the proof which tends to show the existence of a conspiracy will at the same time show the participation of a particular defendant. Faced with that practical situation, a judge has two alternatives. He may at the outset allow proof of the acts of each of the parties in evidence against all, subject to having it stricken if the connection to the conspiracy is not shown: or he may allow it in evidence only against the person to whom it relates, subject to having it admitted against the others when sufficient proof had been adduced from which a jury could find that a conspiracy existed. The second method, the one employed here, was utilized by the trial court in *Blumenthal* v. *United States,* 332 U.S. 539, see fn. 9 p. 551, and an attack on that procedure (see briefs in Nos. 54–57, O.T. 1947) was not deemed by this Court worthy of comment. The significant question is whether the jury had the right to consider the evidence, and whether, when the time came for them to consider it, they were given proper instructions as to how to evaluate it. That was done in this

case, as it was in *Blumenthal*. The present attempt to read controlling significance into the exact wording of the trial court's charge in admitting the evidence during the trial is to magnify words out of all proportion to their importance in the setting of the trial as a whole. See *Glasser* v. *United States*, 315 U.S. 60, 83.[5]

2. Petitioners complain of the extent of the government's cross-examination of defense witness Robert Westerhausen (No. 924, pp. 19–25; No. 925, p. 9; No. 926, p. 9), who was offered in an attempt to impeach the co-defendant Covelli (see Statement, *supra*). That examination, however, was fully justified in light of the witness's unusual background. Westerhausen testified for the defense that he had met Covelli when they both were incarcerated at Leavenworth penitentiary, and that, during the discussions in prison, Covelli admitted giving the F.B.I. false information as to the identity of those involved in the whiskey conspiracy. Since he had affirmatively testified to meeting Covelli in the penitentiary, Westerhausen's criminal background was, of course, known to the jury even without cross-examination.

[5] Petitioner Allegretti's suggestion that this Court should review the grant of rehearing *en banc* (No. 924, pp. 16–19) presents no issue for this Court. It is wholly unwarranted to assume that six judges of the court of appeals have ruled to affirm this case solely because the defendants are notorious (No. 924, p. 19). The Seventh Circuit has not hesitated to reverse in notorious cases which it thought did not accord with the law. See *United States* v. *Accardo*, 298 F. 2d 133. The law in the circuit cannot be said to be confused in view of the present, authoritative *en banc* decision.

But there were other circumstances bearing on his credibility which the government was fully warranted in attempting to bring out. Westerhausen had obtained a reversal of his conviction on a federal charge on the ground that the government had failed to sustain its burden of showing that Westerhausen was "sane" at the time of the crime, and the details of Westerhausen's extensive mental history had been developed in that case, in which he was represented by Frank Oliver, attorney for one of the petitioners. See *United States* v. *Westerhausen*, 283 F. 2d 844 (C.A. 7). Under these circumstances the government was properly allowed a broad scope of cross-examination, not only to develop his possible interest, bias, and association with counsel (A. 354), but also, and in particular, the extent of his mental impairment. Such items clearly were proper subjects of cross-examination (see Wigmore on *Evidence*, vol. III, 3d ed. §§ 931–932, 949, pp. 478–479, 499–504).

Toward the end of the recross-examination, sparked by Westerhausen's re-direct statements that he had recovered from his mental illness (A. 355), and after the government had elicited that his memory also was "better," Westerhausen was asked whether he now recalled killing his stepmother. Although the judge at first indicated he had not even heard the question, he sustained the objection that the question was improper and on request of the defense counsel admonished the jury to disregard it. The question was never answered and the government asked no further questions (A. 356–357). The court of appeals

properly ruled that this one question—a question which the trial judge held to be improper and on which there was prompt instruction—was not ground for a mistrial in light of the overwhelming proof of guilt of crimes about which the witness, who was offered only for impeachment, had no personal knowledge.

3. Petitioners complain of the admission of statements by co-conspirators subsequent to March 17, 1958, when some of the whiskey was seized (No. 924, 28–31). However, the indictment charged, and the evidence showed, that the conspiracy continued after the raid, which netted only 34 cases.

After the raid on March 17, 1958, petitioner Falzone was taken to F.B.I. headquarters where he called Max Olshon to bring him some food. Falzone gave Olshon the keys to close the cafe and also told Olshon to get rid of the whiskey in the walk-in box (A. 69). That evening Olshon dumped 24 gallons, breaking the bottles, and gave one gallon to the cook to take home (A. 69). Falzone, who was released the following day, told Olshon that he (Falzone) was not "going to take the whole fall myself," mentioning Jimmy (James Allegretti), Ruffy (Joseph Lisciandrello) and Louis (Louis Darlak). "But, I am not too worried," he said, "Jimmy will straighten the whole case out for us" (A. 59).

Meanwhile, on the night of the raid, Covelli, after seeing Allegretti and Lisciandrello, left town for two weeks (A. 146). On his return he saw Allegretti, Lisciandrello and others. Allegretti claimed that h

had made a connection to "squash the beef" and told Covelli to raise $2,500, which, together with Allegretti's $2,500, would be used to take care of the matter so that he would not lose his place of business (A. 146, 147, 153). Covelli met Falzone, and together they talked to Darlak about raising the money (A. 153). After some difficulty, $2,500 was raised and given to Allegretti, who took the money, went out the back door, and handed it to someone in a car (A. 154).[6]

These transactions were clearly in furtherance of a conspiracy, which by no means came to an end on March 17, 1958. Stolen whiskey had been stacked in places other than those raided, including Ciro's Cocktail Lounge, in accordance with Allegretti's directions. The destruction of part of the whiskey and the efforts to "squash the beef" in order to stay in business are wholly consistent with the further possession and distribution of the rest of the whiskey. The arrest of Falzone did not terminate the scheme. See *United States* v. *Agueci*, 310 F. 2d 817, 839 (C.A. 2), certiorari denied, 372 U.S. 959. See also *Hyde* v. *United States*, 225 U.S. 347, and *Pinkerton* v. *United States*, 328 U.S. 640, 646–647.

4. Petitioners complain of the admission of statements by two of the co-conspirators in April 1960 (No. 924, pp. 25–28). However, not only did petitioners originate this inquiry on cross-examination and thus open the door to admission of the whole

[6] This latter evidence was admitted solely against Allegretti and Falzone. The court sustained objections thereto as to Frank Lisciandrello and Darlak (A. 154).

conversation, but the trial judge carefully limited its admissibility to the petitioner who directly participated in the conversation.

During cross-examination of Covelli, the defense brought out that he had made a previous statement wherein he disclosed that the conversation regarding "squashing the Beef" had taken place on the day after the raid, *i.e.*, March 18, 1958, rather than some two weeks later (cf. Statement, *supra.*). On further questioning, Covelli admitted that petitioner Falzone had corrected him as to the time during a meeting in April 1960, in the United States Attorney's office in Chicago, and that the government attorneys and an F.B.I. agent were present (A. 226–228). On redirect examination, the testimony regarding this 1960 meeting was admitted solely against petitioner Falzone and was so limited in instructions to the jury (A. 231–232, 233–237, 238).[7] Covelli described how Falzone had corrected him as to various previous statements and also that Falzone had said he would cooperate with the government, but wanted to be named as a defendant so that the others would know he was not talking (A. 238–239, 240). On recross there was more inquiry as to who was present (A. 245).

Later in the trial, when the government placed the F.B.I. agent on the stand for other purposes, he was questioned as to what was said at this April 1960

[7] Petitioners' citations (No. 924, pp. 27-28) are inapposite because, contrary to their assumption, this testimony, unlike that in the cited cases, was explicitly limited to Falzone (see A. 238, 268).

meeting. The agent described Falzone's corrections as to dates and other occurrences and testified to the entire conversation among all those present, including what the government had told Falzone it knew of the facts previously related by Covelli (A. 271–273).

After Falzone had given his version of the 1960 meeting (A. 321–322, 330–332), the F.B.I. agent, in rebuttal, testified as to further conversation with Falzone.[8] All of this testimony was limited to Falzone (A. 268, 424, 426). As thus limited, its admission was clearly proper. *Opper* v. *United States,* 348 U.S. 84, 94.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1965.

[8] Petitioners complain that the government sought to frighten Falzone into not testifying (No. 925, p. 10; No. 926, p. 10). However, this is merely Falzone's version regarding his motives for testifying for Allegretti in this case (cf. A. 427–431).

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